2000-2001
AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, FEDERAL RULES OF EVIDENCE & LOCAL RULES FOR THE EASTERN DISTRICT OF TEXAS

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I.

Rule 16 Management Conference

Rule 16 provides:

AIN ANY ACTION, THE COURT MAY IN ITS DISCRETION DIRECT THE ATTORNEYS FOR THE PARTIES AND ANY UNREPRESENTED PARTIES TO APPEAR BEFORE IT FOR A CONFERENCE OR CONFERENCES BEFORE TRIAL FOR SUCH PURPOSES AS

(1) EXPEDITING THE DISPOSITION OF THE ACTION;
(2) establishing early and continuing control so that the case will not be protracted because of lack of management;
(3) discouraging wasteful pretrial activities;
(4) improving the quality of the trial through more thorough preparation; and
(5) facilitating the settlement of the case.

* * *

AThe [docket control] order shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant.@

Practical Significance of Amendments:

6. Although the national Rule 16 was not amended, the time limits established in the rule take on added significance due to other changes in the rules. Because discovery may not commence until the Rule 26(f) attorney conference occurs, which will in all likelihood not take place until the court sets the case for management conference, courts should endeavor to notice cases for management conference as soon as practicable.

7. The amendments to the Local Rules provide that the management conference *shall take place* within 60 days after the first defendant answers. *See* LOCAL RULE CV-16(a)(emphasis added).

8. Management conferences may be conducted by telephone at the *judge=s* discretion. *See* LOCAL RULE CV-16(a)(emphasis added).

9. As a practical matter, parties need approximately 30 days notice of the management conference so that they have adequate time to confer under Rule 26(f), complete initial disclosure and submit their Rule 26(f) conference report prior to the management conference.

II.
Rule 26(f) Attorney Conference

As amended, FED. R. CIV. P. 26(f) provides in part that:

A...[T]HE PARTIES MUST, AS SOON AS PRACTICABLE AND IN ANY EVENT AT LEAST 21 DAYS BEFORE A SCHEDULING CONFERENCE IS HELD ... CONFER TO CONSIDER THE NATURE AND BASIS OF THEIR CLAIMS AND DEFENSES AND THE POSSIBILITY FOR A PROMPT SETTLEMENT OR RESOLUTION OF THE CASE, TO MAKE OR ARRANGE FOR THE DISCLOSURES REQUIRED BY RULE 26(A)(1) AND TO DEVELOP A PROPOSED DISCOVERY PLAN THAT INDICATES THE PARTIES= VIEWS AND PROPOSALS CONCERNING:

(1) WHAT CHANGES SHOULD BE MADE IN THE TIMING, FORM, OR REQUIREMENT FOR DISCLOSURE UNDER RULE 26(A), INCLUDING A STATEMENT AS TO WHEN DISCLOSURES UNDER RULE 26(A)(1) WERE MADE OR WILL BE MADE;

(2) THE SUBJECTS ON WHICH DISCOVERY MAY BE NEEDED, WHEN DISCOVERY SHOULD BE COMPLETED, AND WHETHER DISCOVERY SHOULD BE CONDUCTED IN PHASES OR BE LIMITED TO OR FOCUSED UPON PARTICULAR ISSUES;

(3) WHAT CHANGES SHOULD BE MADE IN THE LIMITATIONS ON DISCOVERY IMPOSED UNDER THESE RULES OR BY LOCAL RULE, AND WHAT OTHER LIMITATIONS SHOULD BE IMPOSED; AND

(4) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).@

AThe attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan.@

Practical Significance of Amendments to Rule 26(f):

1. No discovery permitted before the Rule 26(f) attorney conference. *See* FED. R. CIV. P. 26(d).

2. Rule 26(f) attorney conference must occur at least 21 days before the Rule 16(b) management conference. Parties must coordinate Rule 26(f) attorney conference.

3. Attorney conference need not be in person unless so ordered by the court.

4. Parties must submit a conference report to the court within 14 days of the conference. Form 35 to the FEDERAL RULES OF CIVIL PROCEDURE appendix contains a sample conference report comporting with Rule 26(f).

5. Courts cannot opt out of this provision by local rule or standing order. *See* FED. R. CIV. P. 26(d).

III.
Mandatory Initial Disclosure

The amended version of Rule 26(a)(1) requires parties to disclose the following:

> THE NAME, ADDRESS AND TELEPHONE NUMBER OF EACH INDIVIDUAL LIKELY TO HAVE DISCOVERABLE INFORMATION THAT THE DISCLOSING PARTY MAY USE TO SUPPORT ITS CLAIMS OR DEFENSES (UNLESS SOLELY FOR IMPEACHMENT PURPOSES) AND THE SUBJECTS OF INFORMATION KNOWN TO THAT INDIVIDUAL;
>
> A COPY OF OR DESCRIPTION BY CATEGORY AND LOCATION OF ALL DOCUMENTS, DATA COMPILATIONS AND TANGIBLE THINGS THAT THE DISCLOSING PARTY MAY USE TO SUPPORT ITS CLAIMS OR DEFENSES (UNLESS SOLELY FOR IMPEACHMENT PURPOSES);
>
> A COMPUTATION OF DAMAGES CLAIMED BY THE DISCLOSING PARTY (EVIDENTIARY MATERIAL SUPPORTING DAMAGE CLAIM IS TO BE MADE AVAILABLE FOR INSPECTION AND COPYING); AND
>
> APPLICABLE INSURANCE AGREEMENTS ARE TO BE MADE AVAILABLE FOR INSPECTION AND COPYING.

Practical Significance of Amendments to Rule 26(a)(1):

1. This controversial amendment will alter the scope of initial disclosure in the Eastern District in a meaningful way. The amendment contemplates a narrow scope of initial disclosure **B** that is, only the identity of witnesses and documents **A**that the disclosing party *may use to support its claims or defenses*.**@** *See* FED. R. CIV. P. 26(a)(1)(A),(B) (emphasis added). The committee notes specifically provide that a party should not disclose witnesses or documents that it does not intend to use. Our LOCAL RULE CV-26 **B** now repealed **B** provided for disclosure of all information that **A**bears significantly on any claim or defense,**@** which specifically included information that would not support the disclosing party=s position.

   The amendments preclude districts from fashioning their own disclosure practices by local rule or standing orders. However, the amendments afford judges discretion to alter the scope of initial disclosure on a case specific basis. The notes specifically reference *limiting* initial disclosure. Absent from the notes is a discussion of whether or not judges may *expand* the scope of initial disclosure. Some courts have already taken the position that the rules enable judges **B** under their broad discretion to control discovery **C** to enlarge the scope of initial disclosure by case specific order.

2. **A**Use**@** is defined in the committee notes to include any use or intended use at a pretrial conference, to support a motion or at trial.

3. Mandatory initial disclosures must be made at or within 14 days after the Rule 26(f) attorney conference. *See* FED. R. CIV. P. 26(a)(1).

4. Parties may stipulate out of initial disclosure by agreement at the Rule 26(f) attorney conference. *See* FED. R. CIV. P. 26(a)(1).

5. A party may make an objection to initial disclosure in the Rule 26(f) conference report to the court. The party should state in the report why initial disclosures are not appropriate in the circumstances of the action. If such an objection is made, there is no duty to disclose until the court has ruled on the issue. The propriety and scope of disclosure will then be addressed by the court at the Rule 16 management conference.

6. Cases in which mandatory initial disclosure is not required: administrative appeals, habeas corpus cases, *pro se* prisoner proceedings, attempts to quash administrative summons or subpoenas, actions by the United States to recover benefit payments or collect on government guaranteed loans, proceedings ancillary to proceedings in other courts and actions to enforce arbitration awards. *See* FED. R. CIV. P. 26(a)(1)(E).

7. Initial disclosure must be amended if later deemed **A**incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.**@** *See* FED. R. CIV. P. 26(e)(1).

8. Penalty for failure to disclose or amend discovery response without **A**substantial justification:**@** appropriate sanctions, including presumptive exclusion. *See* FED.R.CIV.

P. 37(c)(1).

9. Courts can no longer modify or opt out of mandatory initial disclosure by local rule or standing order. Thus, LOCAL RULE CV-26 **B** which established the parameters of initial disclosure in the Eastern District of Texas **B** does not apply to cases filed after December 1, 2000.

10. The committee notes specifically provide that, absent court order or stipulation, a party added after the Rule 26(f) conference has 30 days following its appearance to make its initial disclosure. **A**But it is expected that later-added parties will ordinarily be treated the same as the original parties when the original parties have stipulated to forego initial disclosure, or the court has ordered disclosure in a modified form.@

11. Note that the disclosing party is not required to provide the opposing party with copies of documents and things subject to disclosure as was required by Eastern District rules prior to the December 2000 amendments. A description by category and location is sufficient.

IV.
Scope of Discovery

Amended Rule 26(b)(1) reads:

APARTIES MAY OBTAIN DISCOVERY REGARDING ANY MATTER, NOT PRIVILEGED, THAT IS RELEVANT TO THE CLAIM OR DEFENSE OF ANY PARTY....@

* * *

AFOR GOOD CAUSE, THE COURT MAY ORDER DISCOVERY OF ANY MATTER RELEVANT TO THE SUBJECT MATTER INVOLVED IN THE ACTION.@

ARELEVANT INFORMATION NEED NOT BE ADMISSIBLE AT THE TRIAL IF THE DISCOVERY APPEARS REASONABLY CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE....@

Practical Significance of Amendments to Rule 26(b)(1):

1. The amendments narrow the scope of discovery to which parties are presumptively entitled. Prior to the amendments, parties could obtain **A**discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action.... The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.@

2. The amendments create two tiers of discovery:

Tier One: Attorney-Managed Discovery

- → information Arelevant to the *claim or defense* of any party@
- → parties presumptively entitled to this discovery
- → parties can secure this information through traditional discovery methods (i.e., depositions, interrogatories, requests for production, requests for admission)

Tier Two: Court-Managed Discovery

- → information *relevant to the subject matter* involved in the action
- → only discoverable if court so orders
- → parties must demonstrate good cause(committee notes provide that A[t]he good-cause standard warranting broader discovery is meant to be flexible@)
- → parties can attempt to compel discovery of privileged matters under tier two

3. According to the committee notes, the drafters intended this rule to involve the court more actively in the discovery process.

4. The distinction between information Arelevant to claims and defenses@ and information Arelevant to the subject matter@ of the action is unclear. According to the committee, Athe determination whether such information is discoverable because it is relevant to the claim or defense depends on the circumstances of the pending action.@ The committee notes also state that other incidents of the same type, or involving the same product, could be information relevant to the claims and defenses.

   Under our revised Local Rules, the scope of tier-one discovery is defined broadly. Tier-one discovery specifically includes: information that would not support the disclosing parties= contentions; persons who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the parties; information that is likely to have an influence on or affect the outcome of a claim or defense; information that deserves to be considered in the preparation, evaluation or trial of a claim or defense; and information that reasonable and competent counsel would consider reasonably necessary to prepare, evaluate or try a claim or defense. LOCAL RULE CV-26(d).

   Whether LOCAL RULE CV-26(d) has the effect of curtailing or eliminating tier-two discovery in our district is yet to be seen.

5. The amendments redefine what is discoverable. Under the old formulation, information was presumably discoverable either because it was relevant or because it was reasonably calculated to lead to the discovery of admissible evidence. The amended rule now makes clear that to discover information that is reasonably calculated to lead to the discovery of admissible evidence, the requested information

itself must be relevant.

6. Timing of discovery: a party may not seek discovery from any source before the parties have conferred under Rule 26(f). *See* FED. R. CIV. P. 26(d)

7. Impact on pleading practice: because tier-one discovery is defined with reference to the claims and defenses pled, plaintiffs will in all likelihood plead their claims in more detail in hopes of broadening the scope of tier-one discovery. Note the inherent tension between the new discovery rules and Rule 8's minimal Anotice pleading@ requirements.

   Defendants, on the other hand, may very well wait to plead all their defenses so as to delay discovery thereon. Of course, defendants choosing to do so run the risk that the court may deny leave to amend.

V.
Limits on Discovery

Amended Rule 26(b)(2) provides in relevant part:

> ABY ORDER, THE COURT MAY ALTER THE LIMITS IN THESE RULES ON THE NUMBER OF DEPOSITIONS AND INTERROGATORIES OR THE LENGTH OF DEPOSITIONS UNDER RULE 30. BY ORDER OR LOCAL RULE, THE COURT MAY ALSO LIMIT THE NUMBER OF REQUESTS UNDER RULE 36.@

Practical Significance of Amendments:

1. Presumptive discovery limits in all cases:

   Oral depositions: 10 per side. *See* FED. R. CIV. P. 30(a)(2)(A).

   Depositions on written questions: 10 per side. *See* FED. R. CIV. P. 31(a)(2).

   Interrogatories: 25 may be served upon each party. *See* FED. R. CIV. P. 33(a).

   Requests for production: Unlimited. *See* FED. R. CIV. P. 34.

   Requests for admission: Unlimited. *See* FED. R. CIV. P. 36.

2. Courts may alter the presumptive number of interrogatories and depositions established by the national rule by case specific order B but not by standing order or local rule (e.g., track assignment). Thus, LOCAL RULE CV-26, which establishes presumptive discovery limits for cases by track assignment, does not apply to cases filed after December 1, 2000.

3. To limit the number of interrogatories or the number/length of depositions, the court must

first determine that:

- → The requested discovery is unreasonably cumulative or duplicative (FED. R. CIV. P. 26(b)(2)(i));
- → The requested discovery is obtainable from some other source that is more convenient, less burdensome or less expensive (FED. R. CIV. P. 26(b)(2)(i));
- → The party seeking the discovery has had ample opportunity by discovery in the action to obtain the information sought (FED. R. CIV. P. 26(b)(2)(ii));

or

- → The burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties= resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues (FED. R. CIV. P. 26(b)(2)(iii)).

4. Rule 26(b)(2) provides that the number of permissible requests for admission can be limited by either local rule or case-specific order. However, the Eastern District of Texas has not elected to limit the presumptive number of requests for admission by local rule.

VI.
Depositions

Amended Rule 30(d)provides in part:

AANY OBJECTION DURING A DEPOSITION MUST BE STATED CONCISELY AND IN A NON-ARGUMENTATIVE AND NON-SUGGESTIVE MANNER. A PERSON MAY INSTRUCT A DEPONENT NOT TO ANSWER ONLY WHEN NECESSARY TO PRESERVE A PRIVILEGE, TO ENFORCE A LIMITATION DIRECTED BY THE COURT, OR TO PRESENT A MOTION UNDER RULE 30(D)(4) (TO PREVENT EXAMINATION IN BAD FAITH OR IN SUCH MANNER AS UNREASONABLY TO ANNOY, EMBARRASS OR OPPRESS THE DEPONENT OR PARTY).@

AUNLESS OTHERWISE AUTHORIZED BY THE COURT OR STIPULATED BY THE PARTES, A DEPOSITION IS LIMITED TO ONE DAY OF SEVEN HOURS.@

Practical Significance of Amendments to Rule 30:

1. Presumptive limit on depositions: seven hours of one day. *See* FED. R. CIV. P. 30(d)(2). The committee drafted this amendment with the understanding that reasonable breaks for lunch and other reasons would not count toward the seven hour limit. Now-repealed LOCAL RULE CV-30 limited depositions to 6 hours per witness.

2. Parties may stipulate to longer depositions. Note: The parties **B** without the consent of a third-party witness **B** may agree to depose a third-party witness in excess of seven hours of one day.

3. The court Amust allow@ additional time if Aneeded for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination.@ *See* FED. R. CIV. P. 30(d)(2). By way of example, the notes suggest that a power outage and medical emergency are Aother circumstances@ warranting additional examination time.

4. A party seeking a court order to extend an examination must show Agood cause.@ The committee observed that the following situations may satisfy the good cause requirement justifying longer depositions: the witness needs an interpreter; the examination covers events occurring over a long period of time; the examination requires the deponent to review a large number of documents (the committee recommends that the documents be forwarded to the deponent for review prior to the deposition); multi-party cases where there is a need for each party to examine the witness (duplicative questioning should be avoided); the attorney for the deponent asks questions; and expert depositions that require full exploration of the theories upon which the expert relies.

5. The committee notes make clear that the deposition of *each person* designated by an organizational defendant pursuant to Rule 30(b)(6) may last seven hours of one day.

6. Rule 30 sets forth the three limited circumstances in which it is appropriate to instruct a witness not to answer a question. The rule previously precluded parties from instructing a deponent not to answer for a reason not listed in the rule. Rule 30(d)(1) has been amended to clarify that no person may instruct a deponent not to answer a question for a reason not listed in the rule. The amendment clarifies that, whatever the legitimacy of giving such an instruction, non-parties are subject to the same limitations as parties.

7. As discussed hereafter, deposition objection procedures have been modified by local rule. Prior to the amendments, all objections other than to assert a privilege were reserved for trial. Under amended LOCAL RULE CV-30, objections to the form of the question and responsiveness of the answer must be made during the deposition on pain of waiver.

VII.
Sanctions for Failure to Amend

Amended Rule 37(c)(1) provides in part (paraphrased):

> A PARTY THAT WITHOUT SUBSTANTIAL JUSTIFICATION FAILS TO DISCLOSE OR TO SEASONABLY AMEND A PRIOR RESPONSE TO DISCOVERY IS NOT, UNLESS SUCH FAILURE IS HARMLESS, PERMITTED TO USE AS EVIDENCE AT A TRIAL, AT A HEARING, OR ON A MOTION ANY WITNESS OR INFORMATION NOT SO DISCLOSED. OTHER APPROPRIATE SANCTIONS ARE AVAILABLE.

Practical Significance of Amendments to Rule 37(c)(1): The amendment expands the presumptive automatic preclusion sanction. Prior to the amendment, only matters that parties *failed to disclose* were presumed inadmissible. Under the amendment, if a party *fails to amend* a discovery response, that information is also subject to presumptive exclusion.

2001 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

I.
Electronic and AOther@ Forms of Service

Amended Rule 5(b)(2)(D) provides that service can, in addition to the traditional means specified in (A), (B), and (C), be made by:

> DELIVERING A COPY BY ANY OTHER MEANS, INCLUDING ELECTRONIC MEANS, CONSENTED TO IN WRITING BY THE PERSON SERVED. SERVICE BY ELECTRONIC MEANS IS COMPLETE ON TRANSMISSION; SERVICE BY OTHER CONSENTED MEANS IS COMPLETE WHEN THE PERSON MAKING SERVICE DELIVERS THE COPY TO THE AGENCY DESIGNATED TO MAKE DELIVERY.

Subsection (3) was added to Rule 5, providing that:

> SERVICE BY ELECTRONIC MEANS UNDER RULE 5(B)(2)(D) IS NOT EFFECTIVE IF THE PARTY MAKING SERVICE LEARNS THAT THE ATTEMPTED SERVICE DID NOT REACH THE PERSON TO BE SERVED.

Practical Significance of Amendments to Rule 5: Service by electronic and Aother@ means is authorized if consent of the person to be served is obtained. The consent must be express and in writing; consent cannot be implied from conduct. Electronic service is complete on transmission rather than receipt (consistent with mailbox rule).

II.
Notification of Actions Taken by Court

Rule 77(d) as amended authorizes the district clerk to send notice of orders and judgments to counsel in any manner contemplated by Rule 5(b).

Practical Significance of Amendments to Rule 77: Clerks of court may notify parties of orders by any means specified in Rule 5(b), including electronic and facsimile. Eastern District notifies via facsimile, not electronically.

III.
Copyright Impoundment Proceedings

Subdivision (f) was added to Rule 65, making clear that the federal injunctive procedures apply to copyright impoundment proceedings.

Practical Significance of Amendments to Rule 65(f): Subdivision (f) was added in conjunction with abrogation of the antiquated Copyright Rules of Practice adopted for proceedings under the 1909 Copyright Act. Courts had already used Rule 65 to ensure compliance with due process requirements. The committee notes make clear that impoundment may be ordered on an *ex parte* basis under subdivision (b) if the applicant makes a strong showing of the reasons why notice is likely to defeat effective relief.

2000 AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

I.
Preserving Error B Evidentiary Motions

The amended version of FED. R. EVID. 103(a) includes a provision addressing preservation of error with respect to evidentiary rulings, an issue on which federal courts were heretofore divided. The amendment provides:

> A...ONCE THE COURT MAKES A DEFINITIVE RULING ON THE RECORD ADMITTING OR EXCLUDING EVIDENCE, EITHER AT OR BEFORE TRIAL, A PARTY NEED NOT RENEW AN OBJECTION OR OFFER OF PROOF TO PRESERVE A CLAIM OF ERROR FOR APPEAL.@

Practical Significance of Amendments to Rule 103(a):

1. Under the amendment, if the pre-trial ruling is Adefinitive,@ a party need not renew its objection or make an offer of proof at trial. Where the ruling is not definitive, however, timely objection is still necessary in order to give the judge an opportunity to revisit the admissibility question in the context of the trial.

2. The amendment applies to all evidentiary rulings B whether they occur at or before trial (i.e., motions in limine).

3. This amendment overrules Fifth Circuit case law which required parties to always renew objections at the time evidence is offered at trial in order to preserve error.

4. As a practical matter, many judges Agrant@ motions in limine to the extent that attorneys must approach the bench prior to raising the issue in the presence of the jury. An order granting a motion in limine in this respect would not be considered Adefinitive@ as the court has merely reserved its ruling on the admissibility of the evidence until the issue can be considered in the context of the evidence.

5. The appealing party bears the burden of ensuring that the record establishes that the evidentiary ruling was definitive.

6. With respect to evidentiary issues referred for pretrial determination to magistrates, the rule requiring parties to lodge objections to the order within 10 days to preserve the issue for appeal still applies.

7. It is unclear whether a party waives the right to appeal an evidentiary ruling denying a motion to exclude evidence when that party offers the evidence in its case to Aremove the sting.@ The

committee notes cite precedent coming down both ways on the issue. In this circuit, the rule appears to be that offering the evidence does not function as a waiver of the right to appeal. The committee notes reference *United States v. Fisher*, 106 F.3d 622 (5th Cir. 1997) for the proposition that an accused does not waive his right to appeal the admissibility of a conviction because he testified about the conviction on direct examination.

8. The amendment does not have the effect of overruling *United States v. Luce*, 469 U.S. 38 (1984). *Luce* precludes criminal defendants who unsuccessfully move to suppress prior convictions from appealing that ruling if they decline to take the stand and submit to cross examination.

II.
Admissibility of Accused=s Character

The amendment to FED. R. EVID. 404(a)(2) provides that (paraphrased):

IF EVIDENCE OF A PERTINENT TRAIT OF THE ALLEGED VICTIM IS OFFERED BY AN ACCUSED AND ADMITTED, THE PROSECUTION MAY OFFER EVIDENCE OF THE SAME PERTINENT TRAIT OF THE ACCUSED.

Practical Significance of Amendments to Rule 404(a):

1. Rule 404 only applies in criminal cases.

2. This amendment creates a new exception to the general rule prohibiting the introduction of character evidence for the purpose of proving action in conformity therewith. Prior to the amendment, the government could not introduce negative character evidence of the accused unless the accused opens the door by introducing evidence of his good character.

3. If the accused attacks the alleged victim=s character (e.g., violent character) to show conformity therewith on the occasion in question, then he opens the door to an attack upon his same character trait. However, if the accused offers evidence of *his knowledge* of the victim=s violent character to show that the defendant reasonably feared for his life in a self-defense case, he does not necessarily open the door to evidence of his violent character. In this situation, the testimony was not offered to show that the victim acted in conformity with a violent character, but rather, to demonstrate the accused=s state of mind.

4. The amendment does not permit the government to offer evidence of the accused=s character when the accused attacks the character as a witness under Rule 608 (character and conduct of witness) or Rule 609 (impeachment by evidence of a crime).

5. The amendment will give the defense pause to attack the alleged victim=s character.

III.
Differentiating Expert and Lay Testimony

Prior to the amendments, Rule 701 provided that:

> NON-EXPERT TESTIMONY IS LIMITED TO THOSE OPINIONS AND INFERENCES WHICH ARE (1) RATIONALLY BASED ON THE PERCEPTION OF THE WITNESS AND (2) HELPFUL TO A CLEAR UNDERSTANDING OF THE WITNESS= TESTIMONY OR THE DETERMINATION OF A FACT IN ISSUE.

The amendment to Rule 701 provides that, in addition to these limitations, the opinions and inferences of non-expert testimony cannot be:

> A...BASED ON SCIENTIFIC, TECHNICAL, OR OTHER SPECIALIZED KNOWLEDGE WITHIN THE SCOPE OF RULE 702.@

Practical Significance of Amendments to Rule 701:

1. The amendment was drafted in response to the proliferation of so-called Alay expert testimony@ B testimony by lay witnesses with particular expertise (e.g., law enforcement testimony that the accused=s conduct was consistent with that of a drug trafficker). The committee feared that the reliability requirements for experts set forth in Rule 702 could be evaded by characterizing the witness as lay.

2. The amendment requires that all scientific, technical or otherwise specialized opinion testimony be evaluated under the new Rule 702 three-prong test. The relevant inquiry is not whether the witness is labeled Alay@ or Aexpert,@ but rather, whether the nature of the testimony is scientific, technical or otherwise specialized. If it is, then the reliability of the testimony must be assessed under the Rule 702 framework.

3. A witness may provide both lay and expert testimony.

4. The amendment is important with respect to parties= disclosure obligations. The witness must be disclosed as an expert in accordance with the rules based upon the nature of the testimony as opposed to his characterization as either a lay or expert witness.

5. The notes draw this distinction between expert and lay testimony: lay testimony results from a process of reasoning familiar in everyday life while expert testimony results from a process of reasoning which can be mastered only by specialists in the field.

6. Examples: Police officer can testify as lay witness that accused was acting suspiciously, but testimony to the effect that accused was using drug code language had to be

evaluated under Rule 702; owner of business can testify as to the value and projected profits of his business as a lay witness (need not be qualified as an expert accountant or appraiser); lay witness may testify that a substance appeared to be a narcotic so long as that witness= familiarity with narcotics has been established; witness must be qualified as an expert to testify how narcotics are manufactured and describe the intricate workings of a narcotics distribution network; lay witness could testify that a substance appeared to be blood, but a witness would have to be qualified a s an expert to testify that bruising around the eyes is indicative of skull trauma.

IV.
Admissibility of Expert Testimony

Amended Rule 702 sets forth the standards by which trial courts are to assess the reliability and helpfulness of expert testimony:

(1) TESTIMONY MUST BE BASED UPON SUFFICIENT FACTS OR DATA;
(2) THE TESTIMONY MUST BE THE PRODUCT OF RELIABLE PRINCIPLES AND METHODS; AND
(3) THE WITNESS MUST HAVE APPLIED THE PRINCIPLES AND METHODS RELIABLY TO THE FACTS OF THE CASE.

Practical Significance of Amendments to Rule 702:

1. The amendments affirm the holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* charging courts with the responsibility of acting as gatekeepers with respect to the admissibility of expert testimony.

2. The amendment does *not* have the effect of codifying the specific factors the *Daubert* Court used to evaluate expert testimony (i.e., whether the expert=s theory or technique has been tested; whether the expert=s theory has been subject to peer review and publication; the known or potential rate of error of the theory or technique; the existence and maintenance of standards and controls; and whether the technique is generally accepted in the scientific community). The committee reasoned that the *Daubert* factors were never intended to be exclusive or dispositive, and that the germane factors to consider will necessarily turn upon the nature of the expert testimony. Even so, courts should consider the *Daubert* factors where appropriate. The notes list additional factors that courts have considered when evaluating the reliability of expert testimony.

3. The Rule 702 standard applies to all types of experts **B** not just *scientific* experts.

4. The proponent of the expert has the burden of demonstrating by a preponderance of the evidence that the standards have been met. Proponents do not have to demonstrate that the expert=s

testimony is correct **B** only that it is reliable.

5. According to the committee notes, prong one is Aquantitative@ rather than Aqualitative.@ Put another way, prong one requires that the facts and data upon which the expert relied are *sufficient*.

6. Prongs two and three are Aqualitative.@ In other words, the testimony must be the product of reliable methods and the methods must have been reliably applied to the facts of the case.

7. Although the focus should be on the expert=s principles and methodology **B** as opposed to the expert=s conclusion **B** courts may consider conclusions in deciding whether the expert=s testimony is reliable. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

8. A judicial finding that one expert=s testimony is reliable does not necessarily lead to the conclusion that an opposing expert=s testimony is unreliable.

9. Experts may be qualified by experience alone. If the expert is relying solely on experience, then the witness must explain: (1) how that experience leads to the conclusion reached; (2) why that experience is a sufficient basis for the opinion; and (3) how that experience is reliably applied to the facts.

V.
Disclosure to Jury of Otherwise Inadmissible Evidence Relied Upon by Expert

The amendment to Rule 703 provides in part that:

> A...FACTS OR DATA THAT ARE OTHERWISE INADMISSIBLE SHALL NOT BE DISCLOSED TO THE JURY BY THE PROPONENT OF THE OPINION OR INFERENCE UNLESS THE COURT DETERMINES THAT THEIR PROBATIVE VALUE IN ASSISTING THE JURY TO EVALUATE THE EXPERT=S OPINION SUBSTANTIALLY OUTWEIGHS THEIR PREJUDICIAL EFFECT.@

Practical Significance of Amendments to Rule 703:

1. When an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is presumptively inadmissible by the proponent of the expert.

2. The amendment is a response to the practice of getting information before the jury that is otherwise inadmissible on the ground that the expert relied upon that information to form his opinions.

3. The amendment establishes a balancing test for courts to use in deciding whether the otherwise

inadmissible evidence should be brought before the jury. Note that the balancing test is the *reverse* of the Rule 403 balancing test:

→ Rule 703: precludes admission of the otherwise inadmissible evidence unless the probative value of the information (in assisting the jury to evaluate the expert=s opinions) substantially outweighs its prejudicial effect (presumptively inadmissible)

→ Rule 403: precludes admission of evidence if the probative value of the evidence is substantially outweighed by its prejudicial effect (presumptively admissible)

Probative Value	Prejudicial Effect	FRE 703	FRE 403
1	9	inadmissible	inadmissible
2	8	inadmissible	inadmissible
3	7	inadmissible	inadmissible
4	6	inadmissible	ADMISSIBLE
5	5	inadmissible	ADMISSIBLE
6	4	inadmissible	ADMISSIBLE
7	3	ADMISSIBLE	ADMISSIBLE
8	2	ADMISSIBLE	ADMISSIBLE
9	1	ADMISSIBLE	ADMISSIBLE

4. If the otherwise inadmissable information is admitted under the balancing test, the trial judge *must* upon request give a limiting instruction informing the jury that the underlying information cannot be considered for substantive purposes.

5. The rule does not prevent the opposing party from inquiring about the otherwise inadmissible bases for the expert=s testimony. However, this line of questioning may open the door to rebuttal, further emphasizing the otherwise inadmissible evidence.

VI.
Foundation for Business Records

Amended Rule 803(6) provides that a party may prove up business records either by live testimony of the custodian of the records or by certification that complies with FED. R. EVID. 902(11), FED. R. EVID. 902(12)or a statute permitting certification.

Practical Significance of Amendments to Rule 803(6): The amendment to Rule 803(6) (exception to hearsay rule) enables parties to lay the foundation for the admissibility of business records by certification. Prior to the Rule 803 and 902 amendments, live witnesses had to establish the foundation for such records prior to admissibility.

VII.
Self-Authentication of Business Records

The amendments to Rule 902(11) and 902(12) provide for self-authentication of domestic and foreign business records.

Practical Significance of Amendments to Rule 902:

1. Domestic business records: Rule 902(11) provides that an original or duplicate domestic record of a regularly conducted activity is self-authenticating if it is accompanied by a written declaration by either the custodian of the business records or by some other qualified person. The affiant must certify that the business record:

   → was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

   → was kept in the course of the regularly conducted activity; and

   → was made by the regularly conducted activity as a regular practice.

2. Foreign business records: Rule 902(12) provides that an original or duplicate foreign record of a regularly conducted activity is self-authenticating if it is accompanied by a written declaration by either the custodian of the business records or by some other qualified person. The affiant must certify that the business record:

   → was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

   → was kept in the course of the regularly conducted activity; and

   → was made by the regularly conducted activity as a regular practice.

   The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed.

3. There is a notice requirement built into Rules 902(11) and 902(12) which requires a party: (1) to give written notice of its intent to offer certified records; and (2) to make the records and declaration available for inspection sufficiently in advance of trial so as to give the adverse party a fair opportunity to challenge either the declaration or the records.

4. Because the amendments do not specify the date by which the notice must be given, courts should establish deadlines for both notice and any challenge thereto in the docket control order.

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Certificate of service: Modifies the national rule by requiring the certificate of service to include the date and method of service. *See* LOCAL RULE CV-5(e).

Evidence in support of motions: If parties rely on evidence in support of a motion or response, the evidence must be excerpted (in context)and highlighted. *See* LOCAL RULE CV-7(b).

Briefing: Briefing is to be in the same pleading as the motion or response. *See* LOCAL RULE CV-7(c),(d).

Time in which to respond to motions: A party has 15 (formerly 10) days from the date the motion was served. *See* LOCAL RULE CV-7(e). National counting rules are contained in FED. R. CIV. P. 6. When a party does not respond within the limits proscribed by the rules, the court Awill assume that the party has no opposition.@ *See* LOCAL RULE CV-7(d).

Certificate of Conference: Certificate of conference must be included in all motions **B** *not just discovery motions*. Counsel must certify: (1) that they have conferred with opposing counsel in a good faith attempt to resolve the matter without court intervention and (2) whether the motion is opposed or unopposed. *See* LOCAL RULE CV-7(h).

Title: All pleadings must be titled with the party=s name, litigation designation and statement of the nature of the filing (e.g., Defendant John Doe=s Answer). *See* LOCAL RULE CV-10(a)(2).

Facsimile number: Attorneys must include their facsimile numbers in the signature block. *See* LOCAL RULE CV-10(a)(3); *see also* LOCAL RULE CV-11(c)(1).

Corporate disclosure statement: Although this rule was added in March 2000, it is often overlooked. Corporate parties must file a corporate disclosure statement identifying all parent corporations and listing any publicly held company that owns 10% or more of the party=s stock. Must be filed with the party=s initial pleading and must be supplemented when information changes. *See* LOCAL RULE CV-10(d).

Rule 16 management conferences: Provisions deleted. Management conference must be set no later than 60 days after the first defendant appears (formerly 120 days after issues joined). Judge can conduct conferences via telephone at his discretion. *See* LOCAL RULE CV-16(a).

Rule 26 disclosure provisions: Provisions deleted. National rule amendments preclude modification of disclosure provisions by local rule.

Rule 26 discovery tracking provisions: Provisions deleted. National rule amendments preclude modification of presumptive discovery limits (other than number of requests for admission) by local rule.

ARelevant to claim or defense@ explained: *See* LOCAL RULE CV-26(d). Tier-one discovery is defined as:

(1) information that would not support the disclosing parties= contentions;

(2) persons who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the parties;

(3) information that is likely to have an influence on or affect the outcome of a claim or defense;

(4) information that deserves to be considered in the preparation, evaluation or trial of a claim or defense; and

(5) information that reasonable and competent counsel would consider reasonably necessary to prepare, evaluate or try a claim or defense.

Discovery Hotline: A magistrate judge is available during business hours to immediately hear discovery disputes and to enforce provisions of the rules. Although the discovery hotline itself is not new, the amendments to the rule specifically provide that the hotline is an appropriate means to obtain an immediate ruling on whether a discovery request is relevant to the claims or defenses. The hotline number is (903) 590-1198. *See* LOCAL RULE CV-26(e).

Depositions: Objections to questions during oral depositions are limited to Aobjection, leading@ and Aobjection, form.@ The only proper objection to a response is Aobjection, nonresponsive.@ These objections are waived if not properly made during the deposition. All other objections are reserved for trial. If requested by the opposing party, the objector must give a clear and concise explanation of an objection; failure to do so results in waiver of the objection. *See* LOCAL RULE CV-30. Prior to the amendments, all objections other than to assert a privilege were reserved for trial.

Production of documents and things: *See* LOCAL RULE CV-34. At any time after the parties

have conferred as required by Rule 26(f), a party may request medical records, wage and earning records or Social Security Administration records of another party as follows:

(1) Where a party's physical or mental condition is at issue in the case, that party shall provide to the opposing party=s counsel either the party's medical records or a signed authorization so that records of health care providers which are relevant to injuries and damages claimed may be obtained. If additional records are desired, the requesting party will have to show the need for them.

(2) Where lost earnings, lost earning capacity or back pay is at issue in the case, the party making such claims shall furnish signed authorizations to the opposing party's counsel so that wage and earning records of past and present employers, and the Social Security Administration records, may be obtained.

(3) Copies of any records obtained with authorizations provided pursuant to sections (1) or (2) above shall be promptly furnished to that party's counsel. Records which are obtained shall remain confidential. The attorney obtaining such records shall limit their disclosure to the attorney's client (or in the case of an entity, those employees or officers of the entity necessary to prepare the defense), the attorney's own staff and consulting and testifying experts who may review the records in connection with formulating their opinions in the case.

Note that LOCAL RULE CV-34 does not require plaintiffs to provide an Internal Revenue Service authorization when lost earnings, lost earning capacity or back pay is at issue.

Attorney=s fees: Provision limiting contingent fees to 33 **a** % of the total award deleted. Under the old rules, fees were limited because it was presumed that the discovery rules substantially reduced the cost of litigation. *See* LOCAL RULE CV-83.

Eastern District bar membership fees: New provision implements an annual bar membership fee for all active attorneys. The fee will be collected triennially, with the amount to be determined by the court prior to each collection period. All attorneys who have not paid the fee by the deadline will be suspended from practice without further notice. Upon payment of outstanding fees, suspended attorneys will be immediately reinstated without order of the court. *See* LOCAL RULE AT-1(e).

Standards of practice to be observed by the attorneys: *See* LOCAL RULE AT-3 (emphasis added). New provision requires attorneys to comply with the following standards of practice:

(A) In fulfilling his or her primary duty to the client, a lawyer must be ever conscious of the broader duty to the judicial system that serves both attorney and client.

(B) A lawyer owes, to the judiciary, candor, diligence and utmost respect.

(C) *A lawyer owes, to opposing counsel, a duty of courtesy and cooperation, the observance of which is necessary for the efficient administration of our system of justice and the respect of the public it serves*.

(D) A lawyer unquestionably owes, to the administration of justice, the fundamental duties of personal dignity and professional integrity.

(E) Lawyers should treat each other, the opposing party, the court, and members of the court staff with courtesy and civility and conduct themselves in a professional manner at all times.

(F) A client has no right to demand that counsel abuse the opposite party or indulge in offensive conduct. A lawyer shall always treat adverse witnesses and suitors with fairness and due consideration.

(G) In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer's conduct, attitude, or demeanor towards opposing lawyers.

(H) A lawyer should not use any form of discovery, or the scheduling of discovery, as a means of harassing opposing counsel or counsel's client.

(I) Lawyers will be punctual in communications with others and in honoring scheduled appearances, and will recognize that neglect and tardiness are demeaning to the lawyer and to the judicial system.

(J) *If a fellow member of the Bar makes a just request for cooperation, or seeks scheduling accommodation, a lawyer will not arbitrarily or unreasonably withhold consent. The Court is not bound to accept agreements of counsel to extend deadlines imposed by rule or court order*.

(11) Effective advocacy does not require antagonistic or obnoxious behavior and members of the Bar will adhere to the higher standard of conduct which judges, lawyers, clients, and the public may rightfully expect.

Appendix B: Assignment of Duties to United States Magistrate Judges: Consent forms should be submitted to the clerk. The clerk will not file the consent unless and until all parties to the action have agreed to disposition before a magistrate judge. Contents of consent forms will not be made known to any judge unless all parties have consented to the reference.

Appendix D: Joint Final Pretrial Order: Minor changes were made to the attorney certification requirements.

Internet Access: http://www.txed.uscourts.gov. Contains Local Rules, telephone numbers, general orders, frequently requested cases, the Eastern District fee schedule, judicial caseload profile (for use in motions to transfer venue) and links to other judicial sites. The following forms are available on the website: motion to appear *pro hac vice*, summons, subpoena, general complaint and the attorney admission application. The following forms are included as appendices to the Local Rules: (1) Consent to Proceed Before Magistrate (Appendix B); (2) Civil Cover Sheet (Appendix C); (3) Joint Final Pretrial Order (Appendix D).

Revised: June 6, 2002